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Supreme Court of the United States

OCTOBER TERM, 1959

GEORGE C. MATTHIES,
Petitioner,

v.

THE SEYMOUR MANUFACTURING COMPANY, EARL B. BOIES, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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January 23 1960

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Question Presented

Whether diversity jurisdiction is being abused by petitioner, one of five presumptive remaindermen under two testamentary trusts, in bringing two class suits—one a trust action, and the second a derivative action based on corporate stock held in the portfolios of two active trusts—where petitioner sues as the sole representative of the trust beneficiaries, his citizenship alone creates diversity, and the joinder of all other immediately interested beneficiaries is practicable, but the joinder of any of them would defeat diversity.

Statement of the Case

Diversity jurisdiction depends entirely on the California citizenship of petitioner as the sole representative of an

alleged class (Pet. 68a).** Joinder with petitioner of any person immediately interested would defeat diversity.

Essentially the cases concern a family dispute over the management of two Connecticut testamentary trusts and a Connecticut corporation in which the family and the trusts are interested. The family group is not large; all members are Connecticut citizens except petitioner and his minor daughter (Pet. 67a-68a). The defendants are not numerous (Pet. 1a). Joinder of all parties necessary to a complete adjudication of the dispute is not difficult (Pet. 74a). Such joinder in fact has been accomplished in the Connecticut state courts on no less than nine occasions in the past two and one-half years.** Petitioner, however, has not joined the readily available parties in the federal actions. Joinder would place citizens of Connecticut on both sides of the litigation, thus defeating federal diversity jurisdiction (Pet. 68a). Instead, petitioner brought two federal class suits.

The Court of Appeals dismissed the suits for want of diversity jurisdiction because class actions were not warranted. Petitioner had employed the device of a class action not to avoid difficulties in accomplishing joinder—the usual reason—but to avoid the destructive effect normal joinder

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*Citations in this brief to the petition for certiorari, appendices and record, will be abbreviated as follows:

Petition for certiorari	*e.g.*, (Pet. 1)
Appendices to petition for certiorari	*e.g.*, (Pet. 68a)
Appendix to respondents' brief	*e.g.*, (Resp. App.)
Record filed in this Court pursuant to Rule 21(1)	*e.g.*, (114)
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Portion of original record filed in Court of Appeals consisting of Connecticut Superior Court documents	*e.g.*, (Pet. Ex. D, No. 1)

**See Chart, Resp. App. 2a-3a.

would have on diversity jurisdiction in these cases. Significantly, even Chief Judge Clark, although disagreeing with the court's interpretation of Federal Rule 23, indicated that dismissal of the suits was just (Pet. 90a).

Lack of diversity jurisdiction means that petitioner and those aligned with him in this local dispute may return to the state courts where they have twice brought and twice withdrawn suits involving substantially the same claims (Pet. 67a; Pet. Ex. D, Nos. 1, 3).

Two testamentary trusts are involved: one (the "George trust") created by the will of George E. Matthies who died in 1922; the other (the "Annie trust") created by the will of his wife, Annie W. Matthies, who died in 1939. Both trusts from their inception have been under the continuing supervisory jurisdiction of the Connecticut Probate Court, in which accounts are filed annually (Pet. 66a-67a).

Life tenants and income beneficiaries under both trusts are testators' children, Bernard and Katharine. Presumptive remaindermen of both trusts are the five children of Bernard Matthies, one of whom is petitioner George C. Matthies (Pet. 67a).

A substantial asset of the trusts is stock of The Seymour Manufacturing Company ("Seymour"), a Connecticut corporation (Pet. 68a). A majority of the shares of Seymour is owned by the trusts and by the life tenants in their own names (114, 418 *et seq.*). For many years the trustees and the life tenants had harmoniously controlled this closely-held family corporation. This came to an end in a dispute over the dismissal of the president of Seymour in October 1957 (92; R. 940-41).

Thereafter, in November 1957, a suit—the first of fourteen state court cases in this maze of Matthies family litigation*—was begun in the Connecticut Superior Court.

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*See Chart, Resp. App. 2a-3a.

The co-plaintiffs were Bernard Matthies, one of the life tenants; and his five children, the presumptive remaindermen, *including petitioner*. Defendants were Katharine Matthies, the other life tenant; the three trustees; and Harold E. Drew, who has had a continuing appointment as guardian ad litem from the Connecticut Probate Court for these trusts to protect the interests of minor, unborn and undetermined persons (Pet. 67a, 72a; Pet. Ex. D, Nos. 1, 3).

All plaintiffs in the Superior Court actions except petitioner were Connecticut citizens. All defendants were citizens of Connecticut, except one of the trustees. The Connecticut Superior Court had jurisdiction over the subject matter and all parties necessary to a complete and binding adjudication of the very issues petitioner is straining to have adjudicated in the federal court (Pet. Ex. D, Nos. 1, 3). The state court action, nevertheless, was voluntarily dismissed by plaintiffs and later recommenced in the same state court, by the same plaintiffs, against the same defendants (Pet. 67a). After this second state court action was declared "on trial" by the Superior Court, plaintiffs again voluntarily dismissed (Pet. 51a).

Simultaneously with the dismissal of the second state court suit, petitioner instituted as class actions the present "trust" and "stockholder's" suits in the United States District Court for Connecticut (Pet. 51a). Petitioner was the sole plaintiff. Petitioner's co-plaintiffs in the state court suits—all Connecticut citizens—were not included as plaintiffs in the federal court actions. All defendants in the trust action, except one, are citizens of Connecticut. These same Connecticut citizens, and other Connecticut citizens, are defendants in the stockholder's action (Pet. 68a).

To satisfy the requirements of Rule 23 as to numerosity and impracticability of joinder, petitioner built his class from the following:

2 life tenants (his father and aunt) [both citizens and residents of Connecticut];

5 presumptive remaindermen (petitioner and his three brothers and sister) [all citizens and residents of Connecticut, except petitioner, a citizen of California];

7 minor children of the presumptive remaindermen [all citizens and residents of Connecticut, except petitioner's minor daughter, a citizen and resident of California].

At this point, note that these 14 lineals have interests in both the George and Annie trusts; they are the *only* persons interested in the George trust; and all could readily be joined (Pet. 67a-68a, 74a).

Petitioner, however, added 20 persons to make the class. These (the Wooster-Merrill line) are the holders of remote contingent interests in the Annie trust and would only take in the event that the five adult presumptive remaindermen, their seven children, and any subsequently born lineal descendants all predecease the two life tenants (Pet. 67a). The actuarial chances of this occurring were described by District Judge Smith as "almost nil" (Pet. 13a).

Petitioner's flat assertion that there are 34 persons interested in *both* trusts is wholly erroneous. The 20 persons in the Wooster-Merrill line have contingent interests *solely* in the Annie trust (Pet. 61a, 67a-68a). Indeed, the court below in its unanimous dismissal of the trust action held that this was conceded by petitioner (Pet. 74a).

In the trust action, sweeping relief is sought, including: receivership of the trusts; removal of the trustees (who are subject to the continuing jurisdiction of the Connecticut Probate Court) and appointment of successors; accounting by the trustees and others; injunction against enforcement

of probate decrees settling prior trust accounts (Pet. 67a-68a; 66-67).*

In the stockholder's suit, petitioner bases his derivative action on the theory that since the Matthies trusts, in which he is a presumptive remainderman, hold a bloc of stock in Seymour, he may bring a derivative action as class representative of the trust beneficiaries (Pet. 75a). In this suit there are demands, among others, for a receivership, accounting and money damages (Pet. 68a; 64-65).

A substantial portion of any monies recovered would inure to the benefit of the two life tenants, Bernard (petitioner's father) and Katharine (petitioner's aunt). Bernard participated in and approved substantially all the acts and omissions now alleged to be wrongful and upon which recovery is based (96-7; R. 68-70, 213). Katharine is not named in the federal suits, although she was a defendant in the state actions; and she is strongly opposed to both federal actions (97, 107, 109, 120-1).

It is admitted that the shift from the state courts to the federal court was planned and solely financed by petitioner's father, Bernard (105, 118).

After commencement of the federal actions, petitioner sought secretly to compromise them on terms that would have resulted in Bernard obtaining effective control of Seymour (68-69). Under Federal Rule 23(c), however, any settlement of the class actions must be made openly, after notice to all members of the class and with approval of the district court.**

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*District Judge Smith held the trust action gave the district court a broad *in rem* jurisdiction superseding state jurisdiction within the ambit of the trust action. See note** p. 8 *infra*.

**Judge Waterman in his dissenting opinion (Pet. 84a) apparently thought the proposed settlement offer was legal since made in an "about-to-be-entered lawsuit." Actually, it is undisputed that the offer was made subsequent to the filing of the complaints and therefore in violation of Rule 23(c) (Pet. 49a). Moreover, contrary to Judge Waterman's assumption that the "offer seeks nothing more

The Court of Appeals dismissed both the trust and stockholder's actions for lack of diversity jurisdiction.

Dismissal of the trust action was predicated on the fact that, as Judge Lumbard stated, "the class of beneficiaries of these trusts is so small and so readily available for actual joinder that the maintenance of a representative action is not justified under the provisions of Rule 23(a) . . . as to numerosity and impracticability" (Pet. 66a). The stockholder's action was likewise dismissed on the ground that petitioner could only maintain a derivative shareholder's action if he joined the other beneficiaries of the trust which held the stock. This was because petitioner's interest in the stock was jointly held with these other beneficiaries, and they were not so numerous as to warrant a class suit on their behalf (Pet. 75a, 78a).

In addition, the court warned that any other holding would enable petitioner "*by merely pointing to innumerable interested persons whose joinder would in no event be required, to avoid the obligation to join those whose joinder, under traditional equitable doctrines . . . is essential*" (Pet. 73a) (emphasis added).

Dismissal of the class actions on the grounds stated made it unnecessary for the Court of Appeals to consider respondents' additional jurisdictional contentions (Pet. 74a).

Some of the jurisdictional objections raised by respondents in both the district court and the Court of Appeals—but not treated by the Court of Appeals* were:

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than the maximum relief prayed for in the complaint" (Pet. 84a), the minimum demands in the compromise letter were vastly different from the relief prayed for in the complaint (64-65, 68-69). See opinion of District Judge Smith (Pet. 49a).

*This of course means if this Court were to grant certiorari and were eventually to reverse, the cases would normally be returned to the Court of Appeals for determination of the other jurisdictional points not treated by that court. Those points are fatal to petitioner's

(a) Petitioner, as a presumptive remainderman, could not represent the two life tenants since his interest is basically opposed to that of the life tenants in the allocation of any recovery to corpus instead of to income; the life tenants must be joined as parties and their joinder would destroy diversity.*

(b) The trust action directly interferes with the Connecticut courts' jurisdiction over testamentary trusts; it involves matters which are a part of traditional probate jurisdiction which is not within federal cognizance; and, even if the action is technically within federal cognizance, the circumstances of the case require, as a matter of law, that the exercise of jurisdiction be declined.**

(c) Both the trust and stockholder's actions were brought collusively to invoke the jurisdiction of the district court.

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cause. Granting of certiorari would only further postpone the correct result already reached in these cases. *Cf., Beach* v. *Rome Trust Co.*, 269 F. 2d 367 (2d Cir. 1959). Such postponement would waste judicial time and would severely injure the trusts, the beneficiaries and respondents who have already suffered from prolonged litigation in the state courts. (See Resp. App. 2a-3a).

*This objection and the grounds of (d), *infra*, belie petitioner's assertion that it is undisputed he may represent the other beneficiaries.

**In addition to sustaining diversity jurisdiction the district court also entered a restraining order and an injunction against the respondent trustees, without requiring petitioner to give security as required by Federal Rule 65(c). The restraining order (dated February 16, 1959), enjoining the trustees from selling any of the Seymour stock held in the George and Annie trusts, subsequently was modified by the Court of Appeals (340).

From the injunction (dated March 11, 1959) enjoining a state court action brought by the trustees for a declaration that they are the qualified trustees, the trustees appealed. The district court's opinion granting the injunction (155) asserts a broad *in rem* jurisdiction despite the jurisdiction of the probate and other courts of Connecticut and to the prejudice of the administration of both the George and Annie trusts. Having ordered dismissal of both class actions, the Court of Appeals did not pass on the merits of the injunction appeal (Pet. 80a).

(d) Petitioner had disqualified himself from maintaining the class actions, because he had shown himself to be a faithless representative through his improper, secret offer to compromise; and because he had violated the doctrine of unclean hands by collaborating with his father, Bernard, in bringing the actions in such form that Bernard would be insulated from defenses based on his prior participation in and approval of trust and corporate matters.*

Chief Judge Clark, dissenting from the denial of petition for reconsideration en banc, referred to the "well-known inveterate practice for a court to employ formalism to achieve a just result" and indicated that in his opinion dismissal of the actions on "other grounds urged by defendants and not discussed might seem more apt" (Pet. 90a-91a).

REASONS CERTIORARI SHOULD BE DENIED

The holdings of the Court of Appeals** rejected the improper enlargement of diversity jurisdiction through the unwarranted use of class suits. They present no ques-

*Objection (d), ordinarily not jurisdictional, is so in the cases at bar, which are unique in that petitioner is the *only* person who can represent the "classes" without defeating diversity jurisdiction.

**The panel that heard and decided the appeals (Hincks, Lumbard and Waterman, C.JJ) was unanimous in its dismissal of the trust action (Pet. 80a). This panel divided two to one (Waterman dissenting) in its dismissal of the shareholder's suit (Pet. 80a). The petition for rehearing was denied by this panel two to one (Waterman dissenting) (Pet. 92a).

The petition for reconsideration en banc was denied by a three to two vote of the active judges of the court: Judges Lumbard, Moore and Friendly voted to deny the petition; Judges Clark and Waterman voted to grant the petition (Pet. 89a-92a). Judge Hincks, who had retired before the petition for reconsideration en banc was presented, did not vote on that petition. Judge Clark alone filed a dissenting opinion on the denial of the petition for reconsideration en banc (Pet. 90a). Judge Waterman, although voting in favor of reconsideration en banc, stated that "I reaffirm the content of my dissenting opinion, 270 F. 2d 365 at 375-378" (Pet 92a)

tions of public importance, nor do they conflict with any other circuit.

This is a local controversy. Petitioner makes no claim that the court below misapplied state substantive law. He contends only that the court misinterpreted procedural Rule 23 dealing with class suits.

Petitioner's federal actions are one-man class suits. Unless these representative suits are maintainable by petitioner, and him alone, and without the joinder of parties immediately and substantially interested in the testamentary trusts, diversity jurisdiction fails.

When joinder is practicable, as here, common sense and theory require the actual joinder of persons having substantial rights that are to be adjudicated. The class action, designed to serve a useful purpose, is warranted where the persons constituting the class are so numerous as to make their actual joinder impracticable. Under the doctrine of virtual representation persons having remote estates in property need not be joined in an action where persons with more immediate estates and with the same interests to protect appear as parties. This doctrine is applicable whether or not the interested persons are numerous. The Court of Appeals correctly applied normal principles of joinder, including the doctrine of virtual representation, in determining the propriety of class actions.

In the trust action the persons substantially interested in the testamentary trusts, and who should be joined, are not so numerous as to make their joinder impracticable. A class suit is, therefore, not proper. As a non-class suit, the action does not lie since the joinder of interested parties destroys diversity under the *Strawbridge-Curtiss** rule.

In the shareholder's action, petitioner did not sue on the basis of stock held by him, but on the basis of

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*3 Cranch 267 (1806).

stock held by the trusts. Since he was suing derivatively on behalf of the trusts, he must join the persons interested in the trusts, unless he can bring a class suit on their behalf. For the reasons just stated respecting the trust action, the shareholder's action, as a class suit is not proper; and joinder would destroy diversity.

I

THE COURT BELOW REACHED A JUST RESULT AND CORRECTLY CONSTRUED RULE 23 BY HOLDING THAT CLASS SUITS COULD NOT BE USED TO CREATE DIVERSITY WHERE THE PERSONS HAVING SUBSTANTIAL AND IMMEDIATE INTERESTS WERE NOT NUMEROUS AND THEIR JOINDER IS PRACTICABLE.

The Court of Appeals recognized the historic right of a litigant to be joined when his legal rights are being adjudicated. At the same time it protected diversity jurisdiction against abuse. Approval of petitioner's procedure would condone evasion of the requirement that indispensable parties having an immediate interest in the outcome of litigation be joined, and would virtually abrogate the *Strawbridge* v. *Curtiss* limitation on diversity jurisdiction in situations involving future interests.

Under petitioner's theory in the trust action, all persons having any remote future interest in a trust must be counted in satisfying the numerosity requirement for a class suit under Rule 23(a). Thus the Wooster-Merrill line of remote contingent remaindermen, whose actual interest, if any, is in only one of the two trusts (the Annie), was added to the life tenants, the presumptive remaindermen and their children, to create a "class" large enough to satisfy numerosity. Having overpopulated a class with strawmen, petitioner, the only interested party with citizenship diverse from that of respondents, styled himself the class rep-

resentative, avoided joinder of the non-diverse indispensable parties, and brought the suit solely on the basis of his citizenship.

Petitioner's stratagem purports to be consistent with the liberal class suit provisions of the Federal Rules. All interested persons should be considered, he says; and if they have any interest they are part of a class of interested parties; if the general class of interested parties is large enough, a class suit is warranted. Petitioner's basic premise is that in determining numerosity and impracticability of joinder all interests, no matter how remote, must be counted. This is demonstrably incorrect. The fallacy lies in equating the necessity to protect and bind the holders of interests, no matter how remote, with the necessity to join them as parties. To be sure, though an interest is obscure, it deserves protection, directly or by representation. But such remote interests do not in themselves warrant a class suit. The class suit is properly used when the number of parties who must be joined is so large that joinder is impracticable.

If petitioner's theory were not rejected the class suit device could be used to avoid the joinder of indispensable parties in almost every action involving probate and trust dispositions. Typically in such situations there is a large number of persons who, upon the happening of some remote contingency, may be said to have an interest. If these persons are counted along with those having substantial and immediate interests to form a single class, then it becomes an easy matter for one person to bring a class action and thereby neatly avoid the actual joinder of indispensable parties.

Petitioner's technique also subverts *Strawbridge* v. *Curtiss*. Knowing that *Strawbridge* requires the citizenship of all plaintiffs to be diverse from all defendants, Bernard Matthies, one of the two life tenants, admittedly procured his son, petitioner, to institute the federal actions as class

suits; hired the lawyers; and directed their activities. To avoid joining other indispensable parties, who had conveniently been joined in two prior state actions involving similar claims, but whose presence in the federal suits would have destroyed diversity, petitioner added to their number a group of minor children of the presumptive remaindermen; and the Wooster-Merrills (some 20) having remote interests in the Annie trust, although they had no interest in the George trust.

This device, if allowed here, could be employed in virtually every trust-probate situation in which there are remote contingent takers. It would have the effect of greatly enlarging diversity jurisdiction and entangling the federal courts in the most local of controversies, as well as in conflicts with the state courts. It has had all these effects in this case.*

Petitioner's procedure affords no greater protection to the remote contingent remaindermen than does the holding of the Court of Appeals under Rule 23. Indeed, less. Petitioner, as we have seen, proved to be a faithless representative. Yet under his procedure the persons immediately interested need not be joined and one of them, such as himself, may sue as the class representative. Under the court's holding the persons having substantial and immediate interests, such as the two life tenants and the five presumptive remaindermen, should be joined since these were not numerous and their joinder practicable. And the remote interests of the minor and contingent remaindermen would not go unprotected. First, they can be protected as they were in the state court action, by the continuing guardian ad litem. Second, under the doctrine of virtual representation the interests of the contingent remaindermen can be protected, if necessary, by the joinder of one of their number, such as

*See note ** p. 8, *supra*, dealing with the federal injunction against the trustees' state action.

Ruth Wooster, a citizen and resident of Connecticut. The court realized that an action could proceed without the presence of remotely contingent remaindermen, such as the Merrills who are outside the state and beyond the court's jurisdiction. Moreover, even if no contingent remainderman could be joined, his interests are automatically protected by the presence in the suit of presumptive remaindermen. Since all remaindermen, presumptive and contingent alike, have the same interest—the protection of corpus and the maximum allocation to corpus of any recovery in a suit—the presence in an action of the presumptive remaindermen protects the contingent interests. This is, in essence, the doctrine of virtual representation, and is a common-sense analysis of the factual and legal situation. All of the appellate judges on the panel which heard this case agreed.

In the stockholder's action, which is interwoven with the trust action, the court below properly held—under Connecticut and federal law—that one of several beneficiaries of an active trust which holds corporate stock in its portfolio cannot bring a derivative action on behalf of the trust unless he joins the other beneficiaries or properly brings a class suit on their behalf.

Title to stock in the portfolio of an active trust is in the trustee. If he will not bring a derivative action based on the shares, then as in any other suit brought by beneficiaries in lieu of the trustee, all the other beneficiaries having substantial and immediate interests must be joined. They are indispensable parties since they are jointly interested in the trust corpus. And under general trust law any action against or in lieu of the trustee must be taken jointly. Just as proper joinder in the trust action would destroy diversity jurisdiction, so it would in the derivative action; and, as in the trust action, the trust beneficiaries who should be joined were not sufficiently numerous to warrant petitioner's class suit.

II

THESE CASES PRESENT NO ISSUE OF PUBLIC IMPORTANCE, NOR DO THEY CONFLICT WITH THE DECISION OF ANY OTHER CIRCUIT.

These cases do not present issues of national significance that qualify a case for review by the Supreme Court. Nor do they "present questions whose resolution will have immediate importance far beyond the particular facts and parties involved."* The record demonstrates that the actions are circumscribed by a unique factual situation, involving a family conflict and, in the background, an attempt to gain control of corporate assets. The suits are rooted in the individualized provisions of the testamentary trusts and in Connecticut property law. To turn the issues, as petitioner would do, into matters of vast public interest simply belies reality.

The Court of Appeals unanimously held that in the trust action there were not enough indispensable parties to warrant bringing a class suit. Whether, if the testamentary dispositions had been different other conclusions might have been proper, would be a factual and legal determination for a court to make in some other case.

Nor did the ruling in the stockholder's action—based on Connecticut and federal law—that petitioner failed to establish that he may sue as a representative of the trusts, depart from present law. Interfwined as it was with the trust situation, the case again turned on the interests created by the testamentary dispositions. Since none of the beneficiaries had an interest in actual shares of stock in

*Speech of Chief Justice Vinson (1949) as quoted in Stern & Gressman, Supreme Court Practice, 107 (1954 ed.).

the corpora of the trusts, but rather an undivided interest in the corpora, their equitable interest in the shares was joint. The cause of action, if any, based on these shares belonged collectively to the trust beneficiaries. To rule that holders of joint rights must be joined in a suit involving these rights does not enunciate a new principle of law. See 3 Moore's Federal Practice, §§ 19.11, 19.09 (2d ed.).

Petitioner asserts that the holding below in the stockholder's suit conflicts with that of the Fifth Circuit in *Hurt v. Cotton States Fertilizer Company*, 145 F. 2d 293 (5th Cir. 1944), *cert. denied*, 324 U. S. 844 (1945). It does not. Nor does it conflict with holdings in any other circuit. In *Hurt*, plaintiff, one of several legatees of specific shares had purchased part of this stock prior to the institution of his suit. In this context, *Hurt* held that he, the equitable as well as the legal owner of shares of stock, could bring a shareholder's derivative action. With this holding respondents have no dispute whatsoever. And despite petitioner's repeated assertions to the contrary, neither does the Second Circuit. For the Second Circuit did not, in its opinion, even suggest that equitable owners of specific shares of stock cannot bring a derivative action. It merely stated that where a plaintiff has no *separate* right to individual shares of stock but only an undivided, joint interest in an active trust, which in turn owns shares of stock, plaintiff must join the other beneficiaries of the trust (the other joint equitable owners of the stock) in order to bring a shareholder's derivative action based on their equitable interest. In *Hurt* there was no problem of joinder. Nor was a question of joinder raised.

The opinions in *Hurt* and in this case, therefore, far from conflicting, complement each other. Where an equitable interest in stock is several and involves specific shares of stock a shareholder's double derivative suit may be

brought individually by the equitable owner (*Hurt*).* But where an equitable interest in stock is joint and is not in specific shares, one or more, but less than all, of the joint holders, may not sue individually.** Unless the holders of the joint interests are so numerous as to make their joinder impracticable—in which case a class suit would have been warranted—all must be joined in the double derivative action (holding below). The distinction is obvious and sensible.

Significantly, none of the six appellate judges who considered this case—whether they accepted the petitioner's or the respondents' position—mentioned the *Hurt* line of cases or indicated that a possible conflict might exist with it, although *Hurt* was briefed and strenuously argued by petitioner. It seems clear, therefore, that *no one* on the court below considered that a conflict, direct or in principle, existed between *Hurt* and its decision; and in fact, no such conflict exists.

*For other holdings agreeing with this principle of *Hurt*, see *e.g.*, *Richardson v. Blue Grass Mining Co.*, 29 F. Supp. 658 (E. D. Ky. 1939), *aff'd*, 127 F. 2d 291 (6th Cir. 1942), *cert. denied*, 317 U. S. 639 (1942) and *Wilcox v. Harriman Securities Corp.*, 10 F. Supp. 532 (S. D. N. Y. 1933), both relied on by petitioner (Pet. 20). In *Richardson* plaintiffs were equitable owners of actual shares in the corporation in behalf of which they were bringing the derivative action. In *Wilcox* the suit was for the rescission of a contract and return of securities of which the plaintiffs claimed they were defrauded. The district court allowed plaintiffs to join in a derivative action based on the shares. But again the interests of plaintiffs were in actual shares, to which they had had legal title before the alleged fraud, as in *Richardson*.

**Whitaker v. Whitaker Iron Company*, 249 Fed. 531 (4th Cir. 1918), *cert. denied*, 248 U. S. 564 (1918). See also 3 Moore's Federal Practice, §§ 19.11 and 19.09 (2 ed.) (on joint interests).

III

CLARIFICATION OF RULE 23, IF NEEDED, CAN BEST BE EFFECTED BY EXERCISE OF THE SUPREME COURT'S RULE-MAKING POWER.

Petitioner makes no claim that the court below misapplied state substantive law. There is no *Erie** problem under the court's holding.

Insofar as procedure is involved, if clarification of Federal Rule 23 is needed as a result of the rulings below—as petitioner contends, but which respondents dispute—there are better means than certiorari.

Petitioner urges that this case is appropriate for certiorari because (i) a "pall of confusion" (Pet. 14) will result from the Second Circuit's construction of Rule 23(a) attendant on its unanimous dismissal of the trust action; and (ii) it involves an interpretation of the definition of a "stockholder" under Rule 23(b). But it is precisely because the Federal Rules are involved at a time when this Court's committees are to consider the Rules that the case is particularly *inappropriate* for the grant of certiorari. Federal Rules are best modified by this Court under its rule-making power. Changes should not be wrought from individualized fact situations. As Chief Justice Warren, speaking of the Admiralty Rules said:

> "We think that if the law is to change it should be by rulemaking or legislation and not by decision. Whether the setoff and cross-libel procedure now operative in admiralty is anachronistic, is not a matter best considered by this Court in a litigation without the benefits which normally accompany intelligent rulemaking—including hearings and op-

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Erie Railroad Co. v. Tompkins, 304 U. S. 64 (1938).

portunity to submit data. In addition to this Court's responsibility for rulemaking, the Judicial Conference of the United States has been given certain responsibility in this area . . ." *United States* v. *Isthmian Steamship Co.*, 359 U. S. 314, 323 (1959).*

Furthermore, Chief Judge Clark, in this very case, pointed to that course of action. Judge Clark suggested that amendment or change in Rule 23 "ought to come from the Supreme Court in the exercise of its rule-making functions and upon report from the advisory committee authorized by recent legislation, rather than from an appellate court reviewing a particular case" (Pet. 90a).

CONCLUSION

The decision below in this local controversy rejects enlargement of diversity jurisdiction by unwarranted use of class actions.

These cases have been justly decided. The procedural interpretation of Rule 23 conflicts with no other circuit.

If certiorari is granted by this Court, the ultimate resolution may be years away. Reversal and remand to the Court of Appeals will necessitate consideration by that court of respondents' other objections to federal jurisdiction not ruled on. In all probability the same result of dismissal for want of federal jurisdiction will occur again to the detriment of the trusts in the interim.

In many respects, the present complex of litigation incipiently resembles that of *Gaines* v. *Fuentes*.** This Court

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*See also, *United States* v. *Robinson*, 28 U. S. L. Week 4047, 4050 (U. S. Jan. 11, 1960).

**92 U. S. 10 (1876). See Frankfurter and Shulman, Cases and Other Authorities on Federal Jurisdiction and Procedure 484 (1937 ed.).

should discourage abuse of the federal forum and let stand the dismissal of the federal suits for lack of diversity.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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January 23, 1960

APPENDIX

	Title	Docket Number	Plaintiff(s)
UNITED STATES SUPREME COURT			
	1. Matthies v. Seymour	No. 611	George C. Matthies
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT			
	2. Matthies v. Seymour	Cal. No. 284; Docket No. 25524	George C. Matthies
	3. Matthies v. Boies	Cal. No. 285; Docket No. 25525	George C. Matthies
	4. Matthies v. Boies	Cal. No. 321; Docket No. 25577	George C. Matthies
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT			
	5. Matthies v. Seymour	Civ. No. 7303	George C. Matthies
	Matthies v. Boies	Civ. No. 7304	George C. Matthies

*Status as of January 23, 1960

APPENDIX

MATTHIES FAMILY LITIGATION*
(Cases commenced since November 1957)

Parties		
Plaintiff(s)	Defendant(s)	Nature of Action
George C. Matthies	Same as in Court of Appeals, Cal. Nos. 284, 285 and 321	Trust action; stockholder's action; injunction proceeding
George C. Matthies	Same as in D. Ct. Civ. No. 7303, except defendants Wentworth, Luria, Batiscan and Seymour of Delaware did not appeal	Stockholder's action
George C. Matthies	Same as in D. Ct. Civ. No. 7304	Trust action
George C. Matthies	Same as in D. Ct. Civ. No. 7304	Injunction proceeding
George C. Matthies	All defendants in Civ. 7304, plus Seymour Mfg. Company, Seymour Corp. of Del., Batiscan Company, Alton G. Wentworth and Kolman Luria & Son, Inc.	Stockholder's Action
George C. Matthies	Matthies Trustees, Francis P. Schiaroli, H. Meade Alcorn, Janet P. Redmond and Louise J. McMillan	Trust Action

Date Commenced and Status
Petition for certiorari filed December 24, 1959
Leave to appeal granted January 13, 1959; D. C. order reversed and complaint ordered dismissed September 9, 1959; rehearing and reconsideration en banc denied November 24, 1959; petition for certiorari pending (No. 611)
Leave to appeal granted January 13, 1959; D. Ct. order reversed and complaint ordered dismissed September 9, 1959; rehearing and reconsideration en banc denied November 24, 1959; petition for certiorari pending (No. 611)
Notice of appeal filed March 18, 1959; appeal dismissed September 9, 1959; petition for certiorari pending (No. 611)
Commenced June 2, 1958; dismissed by Court of Appeals September 9, 1959; petition for certiorari pending (No. 611)
Commenced June 2, 1958; dismissed by Court of Appeals September 9, 1959; petition for certiorari pending (No. 611)

(Cont'd. on next page)

CONNECTICUT
SUPERIOR COURT,
NEW HAVEN COUNTY

	Title	Docket Number	Plaintiff(s)
7.	Matthies v. Hackett	Docket No. 86803	Bernard H. Ma and five childr
8.	Matthies v. Hackett	Docket No. 86837	Bernard H. Ma and five childr
9.	Katharine Matthies v. Union & New Haven Trust Company	Docket No. 89260	Katharine Matth Matthies Truste
10.	Katharine Matthies v. Union & New Haven Trust Company	Docket No. 90123	Katharine Matt Matthies Truste
11.	Boies v. Matthies	Docket No. 89455	Matthies Truste
12.	Matthies v. Hackett	Docket No. 89504	Bernard H. M Richard L. Ma
13.	Matthies v. Hackett	Docket No. 89506	Bernard H. Ma Richard L. M
14.	Terry v. Hubbell and Keefe	Docket No. 86804	Robert M. Te
15.	Seymour v. Terry	Docket No. 87965	Seymour Mig

*Intervenors
**Parties to Stipulation
†Continuing guardian ad litem for minor, unborn and undetermined persons *including the Hospital*

APPENDIX—(Continued)

MATTHIES FAMILY LITIGATION

Parties.	
Plaintiff(s)	**Defendant(s)**
Bernard H. Matthies and five children	Matthies Trustees, Katharine Matthies and Harold E. Drew† (guardian ad litem)
Bernard H. Matthies and five children	Matthies Trustees, Katharine Matthies and Harold E. Drew† (guardian ad litem)
Katharine Matthies Matthies Trustees*	Union & New Haven Trust Company Five Matthies children*
Katharine Matthies Matthies Trustees**	Union & New Haven Trust Company Bernard H. Matthies and five children**
Matthies Trustees	Katharine Matthies, Bernard H. Matthies and five children, Harold E. Drew† (guardian ad litem)
Bernard H. Matthies and Richard L. Matthies	Matthies Trustees
Bernard H. Matthies and Richard L. Matthies	Matthies Trustees
Robert M. Terry	George T. Hubbell and T. Mark Keefe
Seymour Mfg. Co.	Robert M. Terry

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Nature of Action	Date Commenced and Status
Trust Action	Commenced November 15, 1957; withdrawn November 20, 1957
Trust Action	Commenced November 20, 1957; withdrawn June 2, 1958
Originally a suit to restrain defendant's proposed sale of Seymour stock held in inter vivos trusts	Commenced November 25, 1958; court entered final judgment directing that Seymour stock be sold at auction on April 16, 1959
Suit to restrain defendant bank's proposed sale of Seymour stock on April 16, 1959 pursuant to court order.	Commenced April 14, 1959; court entered final judgment pursuant to stipulation of all parties directing that Seymour stock be sold at auction on July 1, 1959
Suit for declaratory judgment and will construction	Commenced December 24, 1958; Matthies Trustees enjoined by Federal District Court from proceeding with declaratory judgment action to determine their title to office; complaint in federal suit in which injunction was issued has been dismissed; petition for certiorari pending (No. 611)
Appeal from order of Derby Probate Court approving Trustees' 1957 account in Annie W. Matthies Estate	Appeal filed December 22, 1958; specially assigned for trial February 16, 1960
Appeal from order of Derby Probate Court approving Trustees' 1957 account in George E. Matthies Estate	Appeal filed December 22, 1958; specially assigned for trial February 16, 1960
Libel action involving circumstances under which Terry's employment as president of Seymour terminated	Commenced November 16, 1957; pleadings closed; on the trial list
Action for damages arising out of Terry's mismanagement as president of Seymour	Commenced May 20, 1958; pleadings closed; on the trial list

(Cont'd. on next page)

	Title	Docket Number	Plaintiff
CONNECTICUT SUPERIOR COURT, FAIRFIELD COUNTY			
	16. Matthies v. Carroll	Docket No. 110611	Bernard H. and five ch
CONNECTICUT PROBATE COURT, DISTRICT OF DERBY			
	17. Estate of George E. Matthies Trustees' Annual Accounting for 1957		Bernard H. and five chi
	18. Estate of Annie W. Matthies Trustees' Annual Accounting for 1957		Bernard H. and five chi
	19. Estate of George E. Matthies Trustees' Annual Accounting for 1958		Bernard H. and five ch
	20. Estate of Annie W. Matthies Trustees' Annual Accounting for 1958		Bernard H. and five ch

***Objectants

†Continuing guardian ad litem for minor, unborn and undetermined persons *(including the Wooste*

APPENDIX—(Continued)

MATTHIES FAMILY LITIGATION

Number	Parties		Nature of Action	Date Commenced and Status
	Plaintiff(s)	Defendant(s)		
110611	Bernard H. Matthies and five children	Matthies Trustees	Action for temporary and permanent injunction to enjoin Matthies Trustees from expending trust funds	Commenced December 14, 1959; hearing held January 15, 1960 on orders to show cause why temporary injunction obtained by plaintiffs *ex parte* should not be dissolved and why order of restitution should not be entered against Trustees; parties to submit final briefs by January 27, 1960
	Bernard H. Matthies and five children***	Matthies Trustees, Katharine Matthies and Harold E. Drew† (guardian ad litem)	Application for order approving Trustees' 1957 account	Account filed June 2, 1958; approved by Probate Court November 26, 1958; appeal from probate pending in New Haven Superior Court (No. 89506)
	Bernard H. Matthies and five children***	Matthies Trustees, Katharine Matthies and Harold E. Drew† (guardian ad litem)	Application for order approving Trustees' 1957 account	Account filed June 2, 1958; approved by Probate Court November 26, 1958; appeal from probate pending in New Haven Superior Court (No. 89504)
	Bernard H. Matthies and five children***	Matthies Trustees, Katharine Matthies and Harold E. Drew† (guardian ad litem)	Application for order approving Trustees' 1958 account	Account filed May 29, 1959; hearings concluded; parties to submit final briefs by February 15, 1960
	Bernard H. Matthies and five children***	Matthies Trustees, Katharine Matthies and Harold E. Drew† (guardian ad litem)	Application for order approving Trustees' 1958 account	Account filed May 29, 1959; hearings concluded; parties to submit final briefs by February 15, 1960

ns (*including the Wooster-Merrill line*)